Supreme Court, U.S.
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No. 93-435

In The

Supreme Court of the United States

October Term, 1993

ST. PAUL FIRE & MARINE INSURANCE CO.,

Petitioner,

vs.

ANNA RUE CAMP and JOHN E. VENN, as Trustee of the Estate of Farris D. Kimbell, Jr., M.D.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED (AS REPHRASED)

1. Whether any federal question is presented by the Florida Supreme Court's holding that under Florida law an action for bad faith failure to settle can be brought against a liability insurer by the insured's bankruptcy estate, which is liable for an excess judgment rendered against the insured.

2. Whether a cause of action against a liability insurer for bad faith failure to settle a claim against an insured who becomes bankrupt is property of the bankruptcy estate under 11 U.S.C. § 541(a)(1) or § 541(a)(7).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutes cited by petitioner St. Paul Fire and Marine Insurance Company, respondent John E. Venn believes that 11 U.S.C. § 541(a)(7) and Article V, § 3(b)(6) of the Florida Constitution are involved in this case.

The full text of 11 U.S.C. § 541(a)(7) reads as follows:

> **Property of the Estate**
>
> (a) The commencement of a case under Section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property:
>
> * * *
>
> (7) Any interest in property that the estate acquires after the commencement of the case.

Article V, § 3(b)(6) of the Florida Constitution provides:

> **Supreme Court**
>
> * * *
>
> (b) **Jurisdiction**: The Supreme Court:
>
> * * *
>
> (6) may review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the Supreme Court of Florida.

STATEMENT OF THE CASE

In 1983, Dr. Farris Kimbell, a Florida neurosurgeon, negligently and unnecessarily performed brain surgery on Anna Rue Camp. As a result of Dr. Kimbell's negligence, Mrs. Camp suffered severe damages. When Dr. Kimbell's liability insurer, St. Paul Fire & Marine Insurance Company, refused to settle Mr. Camp's claim for the $250,000 policy limits, Mrs. Camp sued Dr. Kimbell. During the course of the litigation, St. Paul on several occasions rejected Mrs. Camp's offers to settle for the policy limits. Dr. Kimbell also filed for bankruptcy while the litigation was pending. The case went to trial and Mrs. Camp received a judgment of over $3,000,000. After an unsuccessful appeal, St. Paul paid Mrs. Camp $250,000 under the policy. *See* App. 17a-19a, 26a-27a.

Although Dr. Kimbell was relieved of any personal responsibility for the judgment in excess of the policy limits (the "excess judgment"), the judgment became a "general, non-priority unsecured claim against Dr. Kimbell's bankruptcy estate." App. 19a. This case is an action against St. Paul brought by John Venn, the trustee of Dr. Kimbell's bankruptcy estate, for bad faith failure to settle Mrs. Camp's claim. Mr. Venn seeks to recover the excess judgment for which the estate is liable.

St. Paul's statement of the case is generally correct with respect to the case's procedural history, but it contains various factual statements – e.g., that St. Paul's bad faith did not contribute to Dr. Kimbell's bankruptcy, Pet. 3 n.4 & 9 n.9, and that St. Paul's only acts of bad faith occurred, if at all, after Dr. Kimbell filed for bankruptcy, Pet. 9. n.19 – that are either wholly erroneous or remain

for disposition at trial given the reversal of the district court's grant of summary judgment in favor of St. Paul.

For example, St. Paul's assertion that it acted in bad faith, if at all, only after the bankruptcy flies in the face of evidence that St. Paul committed many acts of bad faith prior to the bankruptcy. St. Paul refused to settle the claim even though it was told that Dr. Kimbell might have to file for bankruptcy if the case were not settled, R. IV:141, Exhibit 16; knew that its own experts questioned Dr. Kimbell's surgical technique, *id.* at Exhibit 21; twice ignored the recommendation of the attorney it hired to represent Dr. Kimbell that it should settle for the policy limits, *id.* at Exhibits 22 and 43; knew that independent neurosurgeons had concluded that Dr. Kimbell had been negligent, *id.* at Exhibits 32 and 38; knew that Mrs. Camp continued to deteriorate, *id.* at Exhibit 34; and could not find a "heavy hitter" expert to back up Dr. Kimbell's surgery, *id.* at Exhibit 41. In addition, St. Paul did not discuss the advantages or disadvantages of settlement with Dr. Kimbell. R. V:145. Thus, the premise for the first question presented in St. Paul's Petition – that all of the wrongful conduct took place after the bankruptcy – is not supported by the record. St. Paul cannot say conclusively that its version of the facts is the only conceivable version that a jury must accept.

St. Paul's statement of the case also omits significant facts. St. Paul fails to mention that the excess judgment rendered against Dr. Kimbell was allowed "as a general non-priority unsecured claim against Dr. Kimbell's bankruptcy estate." App. 19a, 27a. This liability was the basis for the Florida Supreme Court's conclusion that under state law the bankruptcy estate had been harmed by the

excess judgment. *See* App. 29a-30a. St. Paul also omits any reference to the bankruptcy clause in Dr. Kimbell's policy, which provided that St. Paul would still be "obligated" under the policy if Dr. Kimbell became bankrupt. App. 26a. The Florida Supreme Court ruled that the bad faith action against St. Paul could proceed as a result of this policy language. *See* App. 29a.

Mr. Venn submits that the procedural history and facts are accurately set forth in the opinions of the Eleventh Circuit, App. 17a-22a, and the Florida Supreme Court, App. 26a-28a, and directs the Court to those opinions. In the body of this Response, Mr. Venn will discuss the facts as relevant to the legal issues presented.

REASONS WHY THE WRIT SHOULD BE DENIED

St. Paul seeks review of the Eleventh Circuit's interlocutory opinion reversing the district court's grant of summary judgment – based on the Florida Supreme Court's resolution of certified questions – and remanding for a trial on Mr. Venn's state-law bad faith claim. As there has not yet been a trial, numerous factual matters regarding the bad faith claim against St. Paul remain unresolved. Without resolution of these matters the Court may not be able to reach the questions presented by this Petition even if it should be inclined to grant review.

This Court's "normal practice" is to "deny[ ] interlocutory review." *Estelle v. Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton Brown Shoe Co. v. Wolf. Bros. & Co.*, 240 U.S. 251, 258 (1916).

Because the lack of a final judgment "of itself alone" furnishes "sufficient ground for the denial" of a petition for certiorari, *id.*, the Court should deny St. Paul's Petition to review the interlocutory judgment rendered by the Eleventh Circuit.

Aside from the interlocutory nature of the Eleventh Circuit's judgment, many reasons support denial of the Petition, including the adequate and independent state grounds supporting the decisions below, the lack of any conflict among the federal and state courts as to whether liability policies and any bad faith actions arising from them constitute property of the bankruptcy estate, and St. Paul's complete change of legal position on appeal as to whether the bad faith action is property of the bankruptcy estate. These reasons, addressed more fully below, demonstrate that there are no "special and important reasons" for granting the Petition. *See* S.Ct. Rule 10.1.

I. THE HOLDINGS OF THE FLORIDA SUPREME COURT AND THE ELEVENTH CIRCUIT THAT ST. PAUL COULD BE SUED FOR BAD FAITH ARE BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS

This case is a bad faith action under Florida law against St. Paul for failure to settle a medical malpractice claim against its insured, Dr. Kimbell; it does not, as St. Paul suggests, involve a claim in bankruptcy arising under federal law. Indeed, because the complaint did not raise any federal issues, St. Paul removed the case from Florida circuit court to federal district court only on diversity grounds. Pet. 4 n.7; R.1:2.

The Florida Supreme Court held that Dr. Kimbell's bankruptcy estate was harmed when the excess judgment was declared a claim against the estate, and that this harm was sufficient to permit a bad faith action by Mr. Venn against St. Paul. App. 29a-30a. St. Paul seems to argue in its Petition that the question of "harm" suffered by the bankruptcy estate as a result of the excess judgment is a question of federal law, Pet. 13, but this contention is meritless. The "determination of property rights in the assets of a bankrupt's estate" is a matter of "state law. Property interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 54-55 (1979). Indeed, the only case that St. Paul cites in support of its contention is a case in which the Second Circuit interpreted New York bad faith law and did not decide any federal issues. *See Harris v. Standard Accident & Ins. Co.*, 297 F.2d 627, 630 (2d Cir. 1961) ("The plaintiff has failed to prove any damage whatever *under New York law*.") (emphasis added), *cert. denied*, 369 U.S. 843 (1962).[1]

The procedural history of the case also shows that the decisions below with respect to the existence of a cause of action are based on adequate and independent state grounds. In the district court, St. Paul, relying on *Fidelity & Casualty Co. v. Cope*, 462 So.2d 459 (Fla. 1985), argued that no cause of action for bad faith existed under Florida

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[1] St. Paul correctly argues that 11 U.S.C. § 541(a)(1) does not "create any new cause of action" for bad faith. Pet. 11. But neither of the decisions below based the cause of action on § 541(a)(1), so St. Paul's argument misses the point. As explained in the text, it is Florida law that creates the cause of action for bad faith. Thus, the third question presented in St. Paul's Petition is illusory.

law because Dr. Kimbell's bankruptcy discharge eliminated any "harm" resulting from St. Paul's conduct. R. II:106.[2] The district court granted summary judgment in favor of St. Paul on the state law ground urged by St. Paul, i.e., that under Florida law no action for bad faith could lie because Dr. Kimbell, as a result of his bankruptcy discharge, had not been "harmed" by St. Paul's conduct. App. 5a-14a. In the district court's view, the "unique and interesting issue" in the case was "whether Dr. Kimbell's discharge in bankruptcy prior to trial relieve[d] St. Paul of any potential liability *under the law of Florida*." App. 5a (emphasis added).

Consistent with the district court's understanding, the Eleventh Circuit found that the case "raise[d] issues of first impression *under Florida law*," and therefore certified various questions of state law to the Florida Supreme Court. App. 17a, 23a-24a (emphasis added). The Florida Supreme Court would not have had jurisdiction to answer the certified questions if the questions presented issues of federal law. *See* Fla. Const. Art. V, § 3(b)(6).

The Eleventh Circuit asked the Florida Supreme Court to decide whether under Florida law an insured's bankruptcy precluded a bad faith action against the insurer. App. 23a-24a. The Florida Supreme Court held that Mr. Venn, as Dr. Kimbell's bankruptcy trustee, could sue St. Paul for bad faith failure to settle a claim against Dr. Kimbell. App. 29a-30a. The Florida Supreme Court

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[2] In *Cope*, the Florida Supreme Court held that a bad faith action does not survive the receipt of a general release by the insured from the injured person. St. Paul has always maintained that a discharge in bankruptcy has the same effect as a release.

rejected St. Paul's argument that there had been no "harm" under its previous decision in *Cope*: "The excess judgment against Dr. Kimbell harmed his bankruptcy estate by increasing the debt of the estate to the detriment of its creditors. . . . As the trustee of the bankruptcy estate, Mr. Venn acted properly in filing a bad faith action to recoup the excess judgment for which the estate remains liable." *Id.*

So as to eliminate any doubt about the state-law moorings of its decision regarding the existence of a cause of action, the Florida Supreme Court also held that St. Paul could be sued for bad faith as a result of a bankruptcy clause in Dr. Kimbell's insurance policy:

> We also note that Dr. Kimbell's liability policy with St. Paul included the following statement: "If the protected person or his or her estate goes bankrupt or becomes insolvent, we'll still be obligated under this policy." The language of the policy affirms that, even if the insured filed bankruptcy, St. Paul would bear the duty to defend and pay off a claim up to the policy limits. St. Paul thus assumed a duty to the bankruptcy estate. It knew, or should have known, that its failure to settle a claim within the policy limits could affect the bankruptcy estate. Accordingly, the bankruptcy trustee, as holder of the policy, would have any cause of action that any insured would have had.

App. 29a.[3] This holding demonstrates that the decisions below concerning the existence of a cause of action for

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[3] Given this unequivocal holding, it is puzzling to see St. Paul contend that the Florida Supreme Court did not answer the certified question relating to the bankruptcy clause. Pet. 6.

bad faith are based on state law; under Florida law a bad faith action sounds in contract. *Shuster v. South Broward Hospital District*, 591 So.2d 174, 176 (Fla. 1992); *Nationwide Mutual Ins. Co. v. McNulty*, 229 So.2d 585, 586 (Fla. 1971).

In sum, the Florida Supreme Court and the Eleventh Circuit did no more than hold that St. Paul could be sued for its bad faith failure to settle notwithstanding the bankruptcy of its insured. This recognition of the existence of a cause of action is, plain and simple, a determination of state law.

II. FEDERAL AND STATE COURTS HAVE CONSISTENTLY HELD THAT A CAUSE OF ACTION AGAINST A BANKRUPT'S LIABILITY INSURER FOR BAD FAITH FAILURE TO SETTLE IS PROPERTY OF THE BANKRUPTCY ESTATE

The only possible federal issue decided by the Florida Supreme Court and the Eleventh Circuit was that the cause of action for bad faith was "property" of the bankruptcy estate. There is, however, no reason for this Court to grant certiorari on that issue; the decisions below followed a long and unbroken line of authority holding that causes of action for bad faith are "property" of the

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Apparently St. Paul has chosen to ignore this language in the Florida Supreme Court's opinion, and has omitted any reference in its Petition to the bankruptcy clause. The omission may be due to the fact that the Florida Supreme Court's interpretation of the bankruptcy clause is consistent with the three other cases dealing with the issue. *See* App. 22a-23a (Eleventh Circuit opinion citing cases).

bankruptcy estate and can be prosecuted by the bankruptcy trustee. Accordingly, there is no conflict to be resolved by this Court.[4]

Under 11 U.S.C. § 541(a)(1) a debtor's liability policy is property of the bankruptcy estate. *See generally In re Edgeworth*, 993 F.2d 51, 55-56 & n.13 (5th Cir. 1993) (citing cases); 4 *Collier on Bankruptcy* ¶ 541.10[5]-[6] & n.17, at 541-70 to 541-71 (1993). Because "[a]ny rights the debtor has against the insurer, whether contractual or otherwise, become property of the estate," *Edgeworth*, 993 F.2d at 55, federal and state courts have consistently held that a cause of action against a liability insurer for bad faith failure to settle is property of the bankruptcy estate and can be prosecuted by the trustee. *See Young v. American Cas. Co.*, 416 F.2d 906, 912 (2d Cir.), *cert. dismissed*, 396 U.S. 997 (1969); *Anderson v. St. Paul Mercury Indemn. Co.*, 340 F.2d 406, 409 (7th Cir. 1965); *Moore v. USF&G Ins. Co.*, 325 F.2d 972, 975 (10th Cir. 1963) (dicta); *Palmer v. Travelers Ins. Co.*, 319 F.2d 296, 299-300 (5th Cir. 1963); *Byrnes v. Phoenix Assur. Co.*, 178 F.Supp. 488, 489-91 (E.D. Wis. 1959); *Purdy v. Pacific Automobile Ins. Co.*, 157 Cal. App. 3d 59, 203 Cal. Rptr. 524, 531-32 (1984); *Wooten v. Central Mutual Ins. Co.*, 182 So.2d 146, 148 (La. App. 1966). *See also* 4 *Collier on Bankruptcy* ¶ 541.10[6] n.19, at 541-71 (1993) (citing *Palmer* and *Moore* as "cases concerned with an action for insurer's breach of duty"). These authorities – none of which are cited by St. Paul in its Petition – show

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[4] A "principal purpose" for exercise of this Court's certiorari jurisdiction is to resolve conflicts among the federal and state courts on matters of federal law. *Braxton v. United States*, 111 S.Ct. 1854, 1857 (1991).

that the decisions below did not create any conflict. Tellingly, St. Paul does not even argue that a conflict exists.[5]

St. Paul tries to dodge these authorities by saying that in this case the excess judgment was entered after Dr. Kimbell filed for bankruptcy and its wrongful conduct (if any) took place only after the bankruptcy. According to St. Paul, only causes of action that "accrue" prior to bankruptcy become property of the estate, and here the cause of action accrued only after the bankruptcy filing. Pet. 8-10.

Even if the predicate for St. Paul's "accrual" argument is accepted at face value,[6] the cause of action is

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[5] St. Paul can only argue that the decisions below are the first of their kind involving a Chapter 7 bankruptcy. Pet. 8, 11. Even if St. Paul is correct, the nature of the bankruptcy is irrelevant to the bankruptcy question presented by St. Paul's Petition; § 541(a)(1) applies to Chapter 7 proceedings just as it applies to Chapter 11 proceedings. 4 *Collier on Bankruptcy* ¶ 541.01, at 541-5 (1993).

[6] Although under Florida law a cause of action for bad faith *accrues* upon the entry of an excess judgment, *Blanchard v. State Farm Mutual Automotive Ins. Co.*, 575 So.2d 1289, 1291 (Fla. 1991), accrual is not equated with the insurer's wrongful conduct. Many causes of action accrue after the tortfeasor's act. Similarly, the timing of the insurer's last rejection of a settlement offer does not fix the date of the insurer's bad faith behavior. "The lack of a formal offer to settle does not preclude a finding of bad faith. . . . Bad faith may be inferred from a delay in settlement negotiations which is willful and without reasonable cause." *Powell v. Prudential Property & Cas. Co.*, 584 So.2d 12, 14 (Fla. Dist. Ct. App. 1991). As explained earlier, there is ample evidence from which a jury could find that St. Paul acted in bad faith well before Dr. Kimbell's bankruptcy filing. *See supra* at 3.

property of the bankruptcy estate. This Court has recognized that § 541(a)(1), whose "scope is broad," *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 (1983), brings into the bankruptcy estate causes of action which are contingent and which have not yet accrued. In *Segal v. Rochelle*, 382 U.S. 375 (1966), this Court unanimously held that under the predecessor to § 541(a)(1) a bankruptcy estate owned loss-carryback tax refund claims arising from losses in a tax year not yet completed when the debtors filed for bankruptcy. This Court rejected the argument of the debtors that the refunds belonged to them and not the estate because "under the statutory scheme no refund could be claimed . . . until the end of the year." *Id.* at 380. It explained that

> postponed enjoyment does not disqualify an interest as "property." That earnings by the bankrupt after filing the petition might diminish or eliminate the . . . refund claim does further qualify the interest, but we have already noted that contingency in the abstract is no bar and the actual risk that the refund claims may be erased is quite far from a certainty.

Id. Under the rationale of *Segal*, the cause of action for bad faith against St. Paul, even if contingent at the time of the bankruptcy filing, became property of Dr. Kimbell's bankruptcy estate under § 541(a)(1).

Contrary to St. Paul's assertion, the decisions below are consistent with the Fifth Circuit's decision in *Palmer v. Travelers Ins. Co.*, 319 F.2d 296 (5th Cir. 1963). In *Palmer*, an insurance company was sued by the insured's bankruptcy estate for bad faith. The insurance company argued that under Texas law the action for bad faith did

not accrue until the excess judgment had been affirmed on appeal. Because the affirmance of the excess judgment occurred after the filing of the bankruptcy petition, the insurance company asserted that no cause of action existed at the time of the petition and hence no cause of action passed to the bankruptcy estate. *See id.* at 299 (stating insurance company's argument that "if under Texas law no right of action accrued until after the filing of the petition in bankruptcy, the trustee has nothing"). The Fifth Circuit rejected the insurance company's argument, and held that, under the predecessor to § 541(a)(1), the cause of action for bad faith, even if contingent, became property of the estate. *Id.* ("*potential* or *contingent* claims that the bankrupt owns at the time of his petition, become[] a part of his estate, with title thereto in the trustee") (emphasis added). Thus, the argument made by St. Paul in its Petition – that a cause of action for bad faith is not property of the bankruptcy estate unless it has "accrued" under state law prior to the bankruptcy filing – is identical to that rejected by the Fifth Circuit in *Palmer*. Again, there is no conflict.

Finally, the Court should deny the Petition because even if the bad faith cause of action were not property of the bankruptcy estate pursuant to § 541(a)(1), it is certainly property of the estate under § 541(a)(7), which provides that the estate includes "[a]ny interest in property that the estate acquires after the commencement of the case."[7] Because Dr. Kimbell's liability policy clearly

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[7] Mr. Venn presented the § 541(a)(7) argument in the district court and on appeal, e.g., R. III:137 at 36, but the Florida Supreme Court and the Eleventh Circuit did not address the argument because they based their decisions on § 541(a)(1).

belonged to the estate as of the bankruptcy filing, even under St. Paul's "accrual" theory the bad faith action constituted "an interest in property" acquired by the estate "after commencement of the case." *See generally In re Wilson*, 694 F.2d 236, 238 (11th Cir. 1982) (§ 541(a)(7) brings into the estate "every . . . interest . . . not covered by a specific statutory provision mandating some other treatment").[8]

III. ST. PAUL'S ARGUMENT CONCERNING THE BANKRUPTCY QUESTION IS INCONSISTENT WITH THE POSITION ST. PAUL TOOK IN THE DISTRICT COURT

St. Paul has completely changed its legal position as to whether the bad faith action is property of Dr. Kimbell's bankruptcy estate. St. Paul now argues that the cause of action does not belong to the estate, but that is not the tune it sang before the district court. In its summary judgment memorandum, St. Paul repeatedly argued that only the bankruptcy estate could prosecute the bad faith action:

> That section [11 U.S.C. § 541] vests the bankruptcy estate with title to all legal and equitable interest of the debtor. Thus, Dr. Kimbell's bankruptcy estate is vested with whatever claim Dr.

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[8] Attempting to paint a parade of horribles, St. Paul suggests that if the decisions below are allowed to stand then debtors who suffer personal injuries after they file for bankruptcy will see any compensation for their injuries become part of the estate. Pet. 11. St. Paul's hypotheticals, however, are far removed from this case because they do not involve actions arising from liability policies issued to debtors.

> Kimbell has against St. Paul arising out of his St. Paul insurance policy.

R. II:106 at 6.

> Mr. Venn's standing as trustee of the Kimbell bankruptcy estate preempts any standing that Mrs. Camp may have to bring this action.

Id.

> Should Venn recover judgment against St. Paul in the case at bar, any monies collected would be payable to the bankruptcy estate for distribution to all of Dr. Kimbell's creditors.

Id. at 7.

> Mrs. Camp has filed a proof of claim in Dr. Kimbell's bankruptcy case and would conceivably receive a pro rata share of any distribution by Venn to creditors.

Id. at 8 n.22.

> [T]heoretically the bankruptcy estate became the owner of Dr. Kimbell's insurance policy at the time of the filing of his bankruptcy petition.

Id. at 11.[9] The district court agreed with St. Paul's arguments. *See* App. 4a ("The cause of action, if any, is Venn's alone as trustee of the bankruptcy estate.").

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[9] In support of its argument in the district court, St. Paul cited to *In re Miller*, 767 F.2d 1556, 1559 (11th Cir. 1985). *See* R. II:106 at 6 n.21. Now, before this Court, St. Paul contends that under *Miller* the bad faith action did not pass to the bankruptcy estate. *See* Pet. 9-10. Mr. Venn submits that St. Paul got it right the first time.

St. Paul's legal flip-flop is a perfect example of a party impermissibly changing its legal position on appeal, *see* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4477, at 786 (1981 & 1983 Supp.), and provides another reason for this Court to deny St. Paul's Petition. The position St. Paul took in the district court should estop it from making a completely contrary argument now. *Cf. Leonard v. Vicksburg, Shreveport, & Pacific R. Co.*, 198 U.S. 416, 423 (1905) (state court's application of "doctrine which forbids parties from assuming inconsistent positions in judicial proceedings" was an adequate and independent state ground and warranted dismissal of writ of error). At the very least, St. Paul "invited" the error of which it now complains.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

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